Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

78-268

LUKE GILLESPIE,

Petitioner,

-against-

GLORIA SCHWARTZ, WILLIAM SCHWARTZ, and BOSTON HOSPITAL FOR WOMEN,

Respondents.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,

Petitioners,

-against-

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Respondent.

RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES T. MURPHY
Attorney for Respondent Kotsonis
1610 Richmond Road
Staten Island, N.Y. 10304
(212) 979-4300

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, Fontini Kotsonis respectfully prays that a Writ of Certiorari not issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 12, 1978.

Pursuant to Rule 40(3) of the Rules of the U.S. Supreme Court, the respondent Kotsonis is satisfied with the requirements of Rule 40 (a-e) as set forth in appellant-petitioner's brief and respectfully refers this Court to appellants' brief therein.

REASONS FOR DENYING THE WRIT

I.

The decision of the Court of Appeals does not conflict with *Shaffer v. Heitner.*

A close analysis of *Shaffer v. Heitner,* 433 U.S. 186, and this case, clearly indicates that Kotsonis is distinguishable from the controlling decision of this Court.

The basis of the *Shaffer* decision is that in order for a Court to exercise quasi-in-rem jurisdiction, the property seized must have some reasonable relationship or contact with the underlying action. In *Shaffer*, the plaintiff was a *non-resident* (emphasis added) who owned one share of stock in the Delaware corporation, and who chose a state forum other than that of his residence. The attached property consisted of shares of stock belonging to certain respondent corporate directors. The property bore no relationship whatsoever to the underlying action, except as to form a possible basis of satisfying an eventual judgment.

The motor vehicle policy attached in this case, bears quite to the contrary.

In *Seider v. Roth,* 17 NY2d 111, 113, the Court stated:

> "Thus as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a "debt" within the meaning of CPLR 5201 and 6202."

Not only do all of the rights, duties and obligations of the insurer grow out of the attached policy, but if there is a recovery in the action, the payment of the judgment will emanate directly out of the terms of said policy, not some unrelated stock option. As pointed out by Judge Friendly in the opinion below, *O'Connor v. Lee-Hy Paving et ano,* Slip Opinion P. 3432; P. 7 of the opinion,

> "If the plaintiffs in these cases had "attached" the debt to defendants of a debtor only transitorily in New York, as in Harris v. Balk, or even bank accounts maintained in New York (See *Majique Fashions Ltd. v. Warwick & Co. Ltd.,* N.Y.L.J. 8-1-78, p. 5 Col. 3—Sup. Ct. N.Y. County—this author's cite), we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other "contacts" with New York."

II.

It is not unfair to subject the Insurer, the real party in interest, to the quasi-in-rem jurisdiction enunciated in *Seider v. Roth.*

That the insurer is the real party in interest in these motor vehicle liability cases is without doubt. As soon as the accident occurs and the insurer receives notification, they are contractually obligated to defend that action wherever jurisdiction over the defendant driver is obtained (Seider, P. 114). They are in complete control of the in-

vestigation; full control of the litigation; select the defendants attorneys; decide when and if to settle; and make all procedural decisions in connection with the litigation (*Simpson v. Loehmann,* 21 NY2d 305, 311).

The petitioner contends that by the continuance of a *Seider* attachment, we are allowing a direct action against the insurer, in violation of Insurance Law 167 (1)(b) of New York State. In *Seider,* the Court held: (17 NY2d at P. 114)

> "It is said that by affirmance we would be setting up a "direct action" against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured."

It has been said that:

> "The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action (only) in order to protect the insurance company against overly sympathetic juries." (Concurring opinion of Judge Keating in *Simpson v. Loehmann* at page 314).

This has not been changed in the instant case. The named defendant is the insured and no prejudice can result to the insurer at trial. The prophetic words of Judge Fuld in *Simpson* (at P. 311), wherein he cites *International Shoe Co. v Washington,* 326 U.S. 310, have now come to fruition through *Shaffer.* The standard by which we shall judge "quasi-in-rem" or "attachment" jurisdiction is basic "fairness." Judging the instant case in terms of fairness, consider the following:

(1) The insurer has agreed, by contract, to defend the insured in any place where jurisdiction may be obtained. The insurer certainly cannot now claim surprise that it must defend in New York or anywhere else, especially in light of our mobile society.

(2) The amount of recovery is necessarily limited to the amount of the policy, so that the individual insured suffers nothing. Again payment for any judgment recovered would come directly out of the policy.

(3) The nominal defendant is still the insured. There is no possible prejudice to the insurer in defending in New York.

(4) The insurer, the real party in interest, is in full control of the litigation, whereas the insured has little or no voice in the handling of the action. Furthermore, the greatest percentage of cases are settled without trial, negating the requirement of the insured to travel from a foreign jurisdiction to the plaintiff's forum for trial. In weighing the equities, consider the burden on the plaintiff travelling to the foreign jurisdiction vs. the expense of travel for the defendant, which is underwritten by the insurer.

(5) New York State has a legitimate governmental interest in protecting the welfare of its citizens:

> "This Court has on a number of occasions given effect to the strong State interest in facilitating recovery of persons injured in automobile accidents. The fact that the injury occurs outside of this State does not of course, lessen that interest." (*Simpson v. Loehmann,* at P. 313)

In the instant case, the plaintiff was rendered a public charge of the State of New York as a result of the death of her husband.

(6) Convenience of witnesses. There are no "live" witnesses to testify in this action. The Maryland police report can be subpoenaed. However, it would be far simpler to obtain expert economic and accident experts in New York on the question of liability and damages. Also, the widow's testimony on damages would be essential. Consider the burden on her, on welfare assistance, of having to travel to Maryland or North Carolina to testify.

(7) Since *International Shoe v. Washington* is now the

standard for quasi-in-rem jurisdiction, let us consider the practical implication of that decision. The manufacturer therein, while deriving great revenues from the State of Washington, tried to avoid the payment of unemployment taxes. So too, Kemper Insurance Company maintains an office in the State of New York; does business regularly in the State of New York; gains considerable premiums from doing business in the State of New York; and surely looks to the Courts of the State of New York to protect its interests if need be. It enjoys all of the protection of the sovereignty by doing business in New York. It is not a *Harris v. Balk* (198 U.S. 215) casual debtor who just happened to be in New York State on occasion. It is not "unfair" to ask them to defend in New York against a claim by a New York resident.

(8) *Savchuk v. Rush* argument—The petitioner has put great emphasis on the fact that the U.S. Supreme Court remanded the case to the state court for reconsideration of the case in light of *Shaffer.* Without considering the obvious differences in fact patterns between *Savchuk* and the instant case, sufficeth to say, in my opinion, the Second Circuit has done what was asked in *Savchuk;* it has considered *Seider* attachment jurisdiction in light of *Shaffer* and has found it still to be viable.

I believe Judge Friendly sums it up best in the opinion below (*O'Connor v. Lee-Hy Paving et ano,* at Slip Opinion page 3439; p. 14 of the opinion):

> ". . . . . although Seider has been the law of New York since 1966, appellants, represented by highly capable counsel, have not brought to our attention a single instance where any of the anticipated 'horribles'—inability or refusal of the insured to appear in New York for deposition or trial, ... , failure to assert a counterclaim, ..., and 'multiple claims where the damages exceed the policy limits and the insured is without funds to pay the excess,' . . . . . has occurred."

CONCLUSION

The instant case meets the "fairness" test of *International Shoe v. Washington.* Wherefore, the Writ of Certiorari to review the order and opinion of the Court of Appeals, Second Circuit, should be denied.

Respectfully submitted,

JAMES T. MURPHY, ESQ.
Attorney for respondent Kotsonis
1610 Richmond Road
Staten Island, N.Y. 10304
(212) 979-4300